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IN THE

Supreme Court of the United States

October Term, 1954
No. 120

JEREMIAH REEVES, JR.,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

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Petitioner,

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STATE OF ALABAMA,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Alabama (R. 184) is reported at 68 So. 2d 14.

Jurisdiction

The judgment of the Superior Court of Montgomery County was affirmed by the Supreme Court of Alabama on August 6, 1953. Rehearing was denied November 27, 1953. Time for filing petition for writ of certiorari was extended to and including March 12, 1954 by order of the Chief Justice dated February 17, 1954. Petition for writ of certiorari and motion for leave to proceed in *forma pauperis* were granted on June 7, 1954. The printed record was received by

petitioner's counsel on August 17, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), petitioner having asserted in the courts below rights, privileges and immunities conferred by the Constitution of the United States.

Questions Presented

I

A.

Whether due process of law guaranteed by the Fourteenth Amendment was denied petitioner—a little-educated, mentally unstable Negro youth—by introduction into evidence of his "confessions" and "inculpatory statements" made following sustained interrogation—punctuated by threats of electrocution—while he was held incommunicado at the State Penitentiary from Monday afternoon through Wednesday morning, near and frequently in the very presence of the electric chair.

B.

Whether, even if, *arguendo,* the confessions were not coerced as a matter of law, due process was denied in that the confession issue was not "fairly tried and reviewed", for the jury which heard the confessions was not permitted to hear the relevant and important testimony offered by petitioner concerning their exaction.

C.

Whether the Supreme Court of Alabama erred in proceeding on the premise that even if the confessions were coerced, it might properly, on the basis of *Stein* v. *New York,* 346 U. S. 156, affirm the judgment of the trial court because there was sufficient evidence apart from the confessions upon which the conviction could have been based.

II

Whether there was systematic exclusion of Negroes from the venire where there was a system of jury selection based entirely upon the jury commissoners' personal acquaintanceship; where they knew very few Negroes and it was "particularly hard" for Negroes to become jurors if the commissioners did not know them; and where jury panels contained only 0% to 8.5% Negroes in a county where the Negro population is 43.6%.

III

Whether due process was denied in that the general public was arbitrarily excluded from all phases of petitioner's trial—especially when this ban included a time when, as subsequent events proved, the public's presence was most necessary: during the *voir dire* when the Chief of Police of the Montgomery Reserve Police Force became a juror, after having concealed his police affiliation which was known to the State but unknown to petitioner.

Statutes Involved

Constitution of the United States—
14th Amendment.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18 U. S. C. § 243.

Exclusion of jurors on account of race or color.—No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000. (June 25, 1948, c. 645, § 1, 62 Stat. 696.)

Ala. Const. of 1901 § 169.

In all prosecutions for rape and assault with intent to ravish, the court may, in its discretion, exclude from the courtroom all persons, except such as may be necessary in the conduct of the trial.

Title 15, Code of Ala. § 320 (1940).

Exclusion of public when evidence vulgar, etc.—In all prosecutions for rape and assault with intent to ravish, the court may, in its discretion, exclude from the courtroom all persons, except such as may be necessary in the conduct of the trial; and in all other cases where the evidence is vulgar, obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young, the presiding judge shall have the right, by and with the consent and agreement of the defendant, in his discretion, and on his own motion, or on the motion of the plaintiffs or defendants, or their attorneys, to hear and try the said cause after clearing the courtroom of all or any portion of the audience whose presence is not necessary.

Statement

Petitioner has been sentenced to death following conviction for the crime of rape without recommendation of mercy (R. 184). The Supreme Court of Alabama has affirmed (R. 194).

I. Events Which Preceded The Trial

During the summer of 1952, there were a number of complaints of rape in Montgomery, Alabama (R. 44, 102, 104, 136). For a period of about six months the police were unable to charge anyone, even though several suspects were arrested (R. 66), including petitioner who was later released (R. 44-45, 104, 141). Petitioner is a 17-year-old Negro with an eighth grade education (R. 116), who comes from a poor family (R. 106-107) and who is mentally unstable (R. 105, 121-122, 124). Finally, on Monday, November 10, 1952, he was arrested once more (R. 135) and was taken out to Kilby prison (R. 137) near the City of Montgomery where he was held under circumstances to be detailed below until he "confessed". Wednesday morning, after his "confession", he was taken to the City Jail.

It appears that several women who had been raped or robbed were there to identify him and that four women other than prosecutrix herein failed to do so (R. 44, 139). Prosecutrix was told that petitioner confessed and was given a copy of a statement purportedly constituting such confession (R. 58, 64); thereupon she saw him, the only Negro in the room, through a window (R. 65), entered the room, and apparently identified him (R. 59).

In the presence of police officers a conversation ensued in which, according to prosecutrix, petitioner identified her house and described his entry (R. 59-60), but was unable to explain the reasons for his actions (R. 59). On Novem-

ber 14, petitioner was indicted for six crimes on six indictments, three of them capital (R. 1, 44)[1] among them was the indictment upon which the conviction herein is based.

II. Preliminary Motions

A. Exclusion of the Public

Trial commenced November 26, 1952 in Montgomery. At the outset, before motions were heard or the jury was empanelled the judge ordered the courtroom cleared of all persons except officials, jurors, and lawyers (R. 2, 10). Petitioner objected and moved that the public be permitted to attend (R. 2, 10, 19). He then moved that at least newspapermen (R. 3, 11) and his relatives (R. 3, 14-15, 19) be admitted. The motion as to relatives was granted (R. 3, 15); but that as to the press was at first denied (R. 3, 11). Subsequently the press was admitted to hear the actual taking of testimony (R. 22). Petitioner objected to these exclusions on the ground that he was thereby denied his right to a public trial as guaranteed by the Fourteenth Amendment (R. 10-11, 14-15, 19-20). Following these objections petitioner moved that if the public were to be excluded, it should be excluded *only* during prosecutrix's testimony on the ground that permanent exclusion from all phases of the trial denied due process of law as guaranteed by the United States Constitution (R. 15, 20). This motion was denied (R. 15). Thus, the general public was excluded prior to the empanelling of the jury and during the trial proper. Petitioner appealed this denial of a public trial to the Supreme Court of Ala-

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[1] At the time he went to trial he made a motion for continuance on the ground that he did not know for which of the three capital offenses he was going to be tried (R. 50). It was denied (R. 45).

bama, urging Federal Constitutional grounds. It ruled against him but did not discuss the question in its opinion.[2]

B. Motion to Quash the Venire

Petitioner moved to quash the venire on the ground that Negroes had been systematically excluded from the jury box in violation of the Fourteenth Amendment (R. 15, 20). The judge was also one of the jury commissioners, and therefore recused himself (R. 15-16). He was replaced by a Special Judge who tried the case from that point on (R. 21).

Evidence revealed that the jury box contained about five thousand cards (R. 38) bearing the names of all persons who had been called for jury service during at least the past 18 years (R. 30), excepting those who had become ineligible or died (R. 30). The commissioners did not known how many Negroes' names were in the box and would not estimate (R. 29, 39). However, one commissioner testified that the largest number of Negroes called at any term was three (R. 30). There have been panels with a smaller number of Negroes (R. 30, 34-35) and there have been terms with no Negroes at all (R. 35). A panel consists of 50 persons although only 35 may actually appear (R. 30). However, if there is a shortage of jurors, additional ones may be called (R. 30).

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[2] The Supreme Court of Alabama noted that the public had been excluded, but merely mentioned this in connection with petitioner's motion to have his private stenographer admitted to the courtroom, which was apparently held to have been waived at a later time because the stenographer could not be located (R. 188-189). The federal question was preserved in petitioner's brief in the Supreme Court of Alabama (see n. 5, *infra*), as follows:

"PROPOSITION XV

ARBITRARY EXCLUSION OF ALL MEMBERS OF THE PUBLIC WITHOUT CLASSIFICATION FROM ALL PHASES OF A RAPE TRIAL IS A DENIAL OF DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES." (Brief of Appellant, In the Supreme Court of Alabama, *Reeves* v. *The State of Alabama*, p. 9.)

The commissioners selected jurors entirely from their personal acquaintance with individuals or organizations (R. 28-29, 36-37). They had obtained lists of names from almost every white club in the County (R. 33), but they knew few Negroes (R. 29, 37) and did not know or go to Negro clubs (R. 33, 36). Only one of them could recall a Negro organization which he had contacted, long ago in the past, and he was not sure of its name (R. 33-34). The Commissioners testified that they did not discriminate (R. 34), that they sought "high class" or "good" Negroes (R. 29, 36, 38) for jury service and never rejected a man because of his race (R. 29). There is testimony that several Negroes had been asked to submit names for the box (R. 36-37, 40, 42), although it does not appear that names ever were submitted by these persons (R. 36, 37, 40, 42), except on one occasion two or three years ago (R. 29), and that a public meeting was held at the start of World War II, attended by "high class" Negroes, and names were requested there (R. 38). Two Negroes testified that they had served on juries (R. 40, 41) and that other Negroes had served with them. However, one commissioner testified that it is "particularly hard" for Negroes to get on the jury without the commissioners knowing them (R. 29).

Petitioners moved on two occasions to examine the cards in the box to ascertain the number of Negroes who had been selected and to test the Commissioners' general assertions by cross-examination (R. 27, 34). Petitioner also sought to interrogate the commissioners concerning the voting list to ascertain whether it had been employed, as required by statute, in selecting jurors (R. 31, 39). These requests were denied (R. 27, 31, 34, 39). The trial court (R. 43) and the Supreme Court of Alabama (R. 187) concluded that there was no evidence to sustain petitioner's motion, and that there was therefore no violation of the Federal Constitution.

III. Testimony At The Trial

A. Commission of the Offense and Identification of Accused

Prosecutrix testified that her assailant entered her home July 28, compelled her to have intercourse (R. 52) and beat her unconscious (R. 62). She identified her assailant in most general terms as a Negro, seventeen to twenty-five years of age, five feet nine and a half to five feet ten inches in height, slightly taller than her husband, 130 to 150 pounds in weight (R. 62, 65), without a mustache (R. 65), wearing a dark blue shirt with a yellow-gold design and a straw hat (R. 52). Petitioner resembles even this general description only in that he is a Negro. There is uncontradicted testimony that he has always had a mustache since he was fourteen (R. 150, 151, 154, 155), that he has never owned the articles of clothing prosecutrix described (R. 107, 150), that he is five feet seven inches tall (R. 150) and that he was under seventeen at the time of the alleged offense (R. 135). The State seized all of petitioner's belongings (R. 102, 107) but produced no items of clothing like those prosecutrix described.

B. Inculpatory Statements and Confession: Testimony By Prosecutrix and Witness Clark

Prosecutrix testified concerning the statements made by petitioner to her at the City Jail (R. 59-60), and also testified that the solicitor had told her that petitioner confessed and that he showed her petitioner's confession (R. 58, 64-65). Petitioner objected to prosecutrix's testimony concerning the incriminating statements on the ground that they had been obtained by coercion which denied due process of law (R. 55-56, 58-59). A hearing was held without the presence of the jury in which petitioner sought to show that he had been held incommunicado at Kilby from 2:00 P. M. on Monday until Wednesday morning

when he confessed, at which time he was taken to the City Jail to be identified by prosecutrix. He sought to show that at Kilby he had been continuously questioned in the presence of the electric chair, had been kept in the room next to the electric chair, that he was offered the hope and promise that if he confessed he would not be electrocuted, but that if he did not confess he would be electrocuted. Petitioner also sought to introduce testimony concerning his age and education (R. 55-56, 58-59).

The judge held that the proffered testimony was inadmissible because it related to events up to the time that petitioner was taken to the City Jail to make the incriminating statements, but did not concern his treatment when he gave the statements at the City Jail (R. 58-59). Prosecutrix then proceeded with her testimony before the jury (R. 59-60, 64-65).

Witness Clark testified that not far from prosecutrix's home at the time of the offense he gave a ride to a person who fit prosecutrix's description of her assailant (R. 71-73) and that this person was petitioner. He then testified to an inculpatory statement petitioner made to him at the City Jail on November 17 (R. 74-75), in which petitioner purportedly recognized him and acknowledged that he had been Clark's passenger. Petitioner objected to the introduction of this statement on the ground that it was the product of the coercion used against him at Kilby (R. 74). The Court overruled the objection on the same ground that it overruled the earlier objection to the prosecutrix's testimony (R. 74), and refused to hear testimony on it.

C. Petitioner's Defense

Petitioner took the stand to deny that he committed the crime and to testify that he was playing dominoes at the time the offense was committed (R. 142-143). Another witness who participated in the domino game corroborated the alibi (R. 126-127). There was testimony that peti-

tioner did not fit the description given by prosecutrix (Compare R. 52, 62-65 with R. 106, 134, 150, 151, 154, 155). In the alternative there was a defense of insanity concerning which a series of lay witnesses testified that petitioner was mentally unstable and in their opinion insane (R. 105, 121-122, 124). There was also testimony of his good reputation (R. 152, R. Orig. 175, 200, 201, 202).[3]

1. *Petitioner's Attempt to Testify Concerning Exaction of Confession.*

Petitioner sought to testify during his own case concerning the treatment he received at Kilby before he confessed and made the incriminating statements in the presence of prosecutrix, witness Clark and the police (R. 138, 139-141).

After petitioner had testified briefly concerning occurrences at Kilby on Monday, the Court stopped him on the ground that the testimony was irrelevant (R. 138-139, 140-141). Petitioner, thereupon made the following proffer (R. 140):

> "Mr. McGee: To show the defendant, a seventeen year old negro boy, who quit school in the 8th grade, was arrested at approximately 2:10 P.M. on November 10th, 1952, and was carried within a period of about fifteen minutes from then to the State Penitentiary, Kilby Prison, Montgomery County, Alabama, where he was held incommunicado by State and City officers and questioned continuously the rest of the afternoon, and then permitted to sleep only a short while, some fifteen or twenty minutes; he was then carried into the next room where the electric chair was and questioned some more by the Deputy Warden O. R. Dees and accused of having

[3] R. Orig. indicates pages of the original record which were not printed.

made various kinds of attacks on some six white women of Montgomery County, Alabama. O. R. Dees further told him that if he didn't confess to these crimes that all the women would identify him and he was going to the electric chair. And that if he would confess that he would keep him out of the chair. After questioning him all night he was finally permitted to go to bed until the following morning, Tuesday. Tuesday morning early the officers again began a series of constant questioning all day Tuesday and part of Tuesday night. Then he was permitted to go to bed. That on Wednesday morning he was again questioned. And all the time the officers were telling him if he didn't confess to these crimes he would go to the electric chair, and if he did he would keep him out of the chair, until sometime finally Wednesday morning he agreed to confess to all of these crimes they had been accusing him. That he was then carried by the State Officers of Montgomery County to Police Headquarters and there held by the Montgomery County Police and City Police officers until the prosecutrix in this case was permitted to view him.

"And I move the Court to permit me to prove these allegations, and in order to go to the credibility of the statement which is alleged he made in her presence while he was held.

"And I move the Court to permit me to do so on the ground that a failure by the Court to permit me to do that is a denial to the defendant of his constitutional rights as guaranteed under the Fourteenth Amendment to the Constitution of the United States."

The motion was denied (R. 141).

Thus, the jury was denied substantial and crucial testimony concerning the entire pattern of coercion, and knew nothing about what happened at Kilby Tuesday and Wednesday.

D. Rebuttal: Confession to Dr. Bazar

In rebuttal the state presented the testimony of Dr. Bazar, a psychiatrist, whom they had caused to examine petitioner. Dr. Bazar concluded that petitioner was not legally insane, and testified that while examining petitioner on November 13, petitioner confessed to him (R. 165).[4] Petitioner objected to testimony of the confession as having been obtained in violation of the Constitution and exacted by the same coercion which produced the earlier confession. He made an offer of proof which was refused (R. 164-165). The Court overruled him.

Thus attempts to introduce testimony concerning the coercion of inculpatory statements and confessions were rebuffed on four occasions, each time over a Federal Constitutional objection. Neither the Court nor the jury heard the testimony. The Supreme Court of Alabama sustained the trial court's actions as to the confessions and held that defendant's rights under the Federal Constitution were not infringed (R. 191, 192, 193). It wrote that there was "nothing to show that the trial court's action in admitting them was manifestly wrong or that defendant's rights under the Federal Constitution were infringed" (R. 193).

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[4] Dr. Bazar states that he saw petitioner twice; on November 13th at Kilby and on November 20th at the County Jail (R. 161). He does not specify on which occasion the confession was made. Petitioner, however, admits confessing at Kilby and denies making any confession at the County Jail (R. 144).

IV. Motion for Mistrial Because Juror Chief of Reserve Police Force

Shortly before the trial ended petitioner informed the court that he had just discovered that one of the jurors, Jack Page, was Chief of Police of the Reserve Police Force of Montgomery and had been active in this case. Petitioner thereupon moved for a mistrial on the ground that this juror had answered falsely on *voir dire*. Petitioner further averred that the juror was Chief of the Montgomery Reserve Police Force organized for the purpose of tracking down "alleged Negro rapists" and night burglars, and that he had been active in this case (R. 172-173), and asked to call Page as a witness in support of this motion. The state admitted that Page was a member of the Police Force and had been working on cases, but denied that he had worked on this case. The Solicitor stated:

> "There was no question asked whether any member of the panel was a member of the Reserve Police Force. I am a member of the Naval Reserve and that doesn't enter into my qualifications. He has been working on cases, but has not worked on or had any connection with this case, and didn't have any opinion or bias in this case" (R. 172).

The trial court denied a hearing on the matter and overruled the objection on the ground that the jury had already been qualified (R. 173). The Supreme Court of Alabama sustained the trial court (R. 193).

The opinion of the Supreme Court of Alabama appears at page 185 of the Record.[5]

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[5] It should be noted that pursuant to Title 15, Code of Alabama, § 389 (1940), this Record contains no assignments of error. The matters which petitioner raised in the Supreme Court of Alabama were presented in his brief according to State practice.

Summary of Argument

The introduction into evidence of petitioner's "confessions" and "inculpatory statements" denied due process of law guaranteed by the Fourteenth Amendment because they were obtained following sustained interrogation and threats of electrocution while petitioner—a little-educated mentally unstable Negro youth—was held incommunicado at Kilby State Penitentiary from Monday afternoon through Wednesday morning, near and frequently in the very presence of the electric chair. The fact that the inculpatory statements to the prosecutrix, witness Clark and Dr. Bazar were made at the nearby City Jail shortly following the coercion at Kilby does not absolve the State of the consequences of the coercion at Kilby. There is a presumption that petitioner remained under the influence of the coercion; and this presumption was not dispelled by the evidence which, indeed, indicates no significant change in his situation.

Even if the confessions and inculpatory statements made at the City Jail were not coerced as a matter of law, petitioner was denied due process in that the confession issue was not "fairly tried and reviewed." Petitioner was not permitted to testify before the jury concerning the pattern of coercion which exacted the confession at Kilby State Penitentiary, and concerning the confessions made at the City Jail which followed the confession at Kilby. Thus, the jury heard the confessions and the State's side of the story that they were voluntary, but was denied relevant and important defense testimony concerning how the confessions were coerced.

The Supreme Court of Alabama erred in holding that even if the confessions were coerced this Court's opinion in *Stein* v. *New York*, 346 U. S. 156 made reversal unnecessary, because there was evidence apart from confessions

upon which the conviction could be sustained. But this Court's opinion in the *Stein* case was concerned with a quite different problem: (1) In the *Stein* case the confession was held not to have been coerced. (2) This Court then went on to say that where a confession is not coerced *as a matter of law*, an appellate court need not reverse even though it is possible that the *jury* might have found it coerced *as a matter of fact* and convicted defendant nevertheless. (3) In the *Stein* case defendant had been permitted to put on evidence relevant to the issue of coercion. Here petitioner was not permitted to do so. (4) In the *Stein* case petitioner requested an instruction for acquittal if the jury found the confession coerced. That issue is not involved here. This Court would not have upset its long standing rule that where a conviction is tainted by a coerced confession the conviction must fall, without saying so explicitly.

There was systematic exclusion of Negroes from juries in Montgomery County, caused by a system of jury selection which relied wholly upon the jury commissioners' personal acquaintanceship, when the commissioners knew few Negroes. Thus, as one commissioner testified, it was "particularly hard" for Negroes to become jurors. As a result, although the Negro population of Montgomery County is 43.6%, no more than 3 Negroes or (a range of 0% to 8.5% of any panel) ever appeared on any jury panel.

Arbitrary exclusion of all portions of the general public from the entire trial denied petitioner's right to a public trial as guaranteed by the due process clause of the United States Constitution. The right to a public trial is recognized uniformly throughout the English speaking world. The only limitations upon it which are generally admitted are those which contribute to the fair and orderly administration of justice. Thus, children and unruly persons may be excluded, or the general public may be excluded for

a limited time during, for example, the testimony of a prosecutrix who cannot express herself before a large audience. Cases upholding the exclusion of the entire public from all phases of a criminal case, over a defendant's objection, have been found in but a few states. Such arbitrary exclusion is unrelated to the orderly and fair administration of justice, and even to the State's avowed purpose of protecting the morals of the public. If petitioner's motion to limit the exclusion of the public only to the time of prosecutrix's testimony had been granted, petitioner's rights would have been protected. Certainly, the exclusion of the public during the empanelling of the jury had no reasonable relation to any permissible purpose and may have seriously prejudiced petitioner, for without petitioner's knowledge—although the State knew of it—the Chief of the Reserve Police Force of Montgomery County became a member of the jury after having failed to disclose his police affiliation on *voir dire*. Thus petitioner was tried by a juror with an interest in his conviction. One of the principal reasons for the public trial right is that it is designed to prevent miscarriages of justice abetted by concealment of this sort.

These were not merely individual fatal flaws in petitioner's trial, but considered cumulatively these errors robbed petitioner's trial of any semblance of the open quality which characterizes judicial proceedings in the United States and, indeed throughout the English speaking world.

ARGUMENT

I

A.

Due process of law guaranteed by the Fourteenth Amendment was denied to petitioner—a little-educated, mentally unstable Negro youth—by introduction into evidence of his "confessions" and "inculpatory statements" made following sustained interrogation, punctuated by threats of electrocution, while he was held incommunicado at the State Penitentiary from Monday afternoon through Wednesday morning near and frequently in the very presence of the electric chair.

The confessions [6] which were introduced into evidence were coerced as a matter of law. There is no controversy as to the facts because the issue arises upon proffers (R. 55-56, 58-59, 74, 164-165, 139-141), which were rejected as irrelevant by the trial court and as irrelevant and insufficient in law by the Alabama Supreme Court. Nowhere are the allegations denied by the State.[7] Indeed, although

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[6] There are involved inculpatory statements which amounted to confessions (R. 59-60, 75, 190-191), a confession (R. 165-166) and testimony that there had been a confession (R. 58, 64-65). For brevity, petitioner refers to them as the confessions, except where it is necessary to distinguish among them.

[7] There is some testimony of a general nature apparently introduced to exculpate the State from a charge of coercion, but it does not amount to denying any of petitioner's allegations: There is testimony by prosecutrix that she knew nothing of what occurred prior to petitioner's statements at the City Jail (R. 57), that she saw no one threaten petitioner there (R. 55, 57); by the Director of the State Department of Toxicology and Criminal Investigation that no one coerced petitioner between 2:30 and 3:00 P. M. on November 11th (R. 92-93); by petitioner that the Solicitor told petitioner he would help him (R. 143); by the Prison Classification Officer that the Solicitor told petitoiner he could make him no promises and would get him a lawyer if he didn't hire one (R. 159); by Captain J. Lewis Miller of the detective force of Montgomery that in his presence no one coerced petitioner at the City Jail (R. 156).

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testimony in support of the proffers was forbidden, there is incidental corroboratory testimony in the record.[8]

Prior to the introduction of the confessions petitioner in these proffers offered to prove the existence of many facts each of which this Court frequently has held to be relevant on the issue of coercion:

That he was a Negro,[9] seventeen years of age,[10] had an eighth grade education,[11] that he was held incommunicado

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[8] On cross-examination, S. E. Sellers, City Detective, testified that he was at Kilby on November 10th and was with defendant for twenty to forty minutes, that during this time Warden Dees was present, that petitioner was in the room next to the electric chair, but that he (Sellers) did not hear what was said (R. 99-100). Petitioner's mother testified that she had not been permitted to see him until Wednesday afternoon (R. 102-103). Petitioner's father testified he had not been permitted to see him until Thursday (R. 116-117). There was testimony by the Prison Classification Officer that petitioner was held without a charge lodged against him (R. 160). Before petitioner's testimony was interrupted, he testified as to his age (R. 135); that he had been threatened in a number of ways by the officers who picked him up, including with the electric chair (R. 137-138); that he was held incommunicado (R. 137); that on Monday he was questioned till dark, went to sleep and was then awakened and taken into the room with the electric chair (R. 138); that Warden Dees threatened him with the chair if he did not confess (R. 138). That he did not see his parents until 5:00 P. M. Wednesday (R. 141); that he was frightened (R. 142).

[9] In ascertaining whether a confession is coerced, this Court gives weight to the fact that defendant is a member of an unpopular racial group. *Chambers* v. *Florida*, 309 U. S. 227, 237, 241; *Ward* v. *Texas*, 316 U. S. 547, 555; *Harris* v. *South Carolina*, 338 U. S. 68, 70, as part of considering his "condition in life" *Gallegos* v. *Nebraska*, 342 U. S. 55, 67. See, Mr. Justice Jackson's dissenting opinion in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156, 173.

[10] Whether defendant is mature or immature is important in evaluating whether a confession has been coerced. *Haley* v. *Ohio*, 332 U. S. 596.

[11] The degree of education which a defendant has had is an important factor in evaluating whether a confession has been coerced. *Ward* v. *Texas*, 316 U. S. 547, 555; *Harris* v. *South Carolina*, 338 U. S. 68, 70.

at Kilby from about 2:00 P. M. on Monday the 10th, through 5:00 P. M. on Wednesday the 12th, that he was denied permission to talk to or phone anyone, that friends and relatives had been forbidden to see him or speak to him,[12] that he was continuously questioned and abused,[13] was kept next to the room with the electric chair, that he

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[12] Holding petitioner incommunicado was not only in probable violation of Alabama law, 15 Code of Ala. § 160 (1940), *Ingram* v. *State*, 34 Ala. App. 597, 601, 42 So. 2d 30 (1949), but contrary to the almost universal rule. See statutes collected in *McNabb* v. *U. S.*, 318 U. S. 332, 342, fn. 7. Although there has been some controversy over whether this alone should vitiate a confession it is at least a serious factor to be weighed, because, "[t]o delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third degree' methods. Therefore [this Court] regard[s] such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion." *Stein* v. *New York*, 346 U. S. 156, 187. See also *Harris* v. *South Carolina*, 338 U. S. 68, 71; *Turner* v. *Pennsylvania*, 338 U. S. 62, 64; *Ward* v. *Texas*, 316 U. S. 547, 555; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152; *Malinski* v. *New York*, 324 U. S. 401, 412, 417; *Turner* v. *Pennsylvania*, 338 U. S. 62, 66, 67.

[13] If petitioner had been able to develop this line of inquiry he would have been able to show the nature and extent of the interrogation. Questioning began after 2:00 P. M. on the afternoon of Monday the 10th (R. 140) and continued until dark (R. 138); petitioner then slept for fifteen or twenty minutes and was awakened and taken into the room with the electric chair (R. 140); he was questioned there all night (R. 140); early Tuesday morning he was awakened and he was then questioned all day Tuesday and part of Tuesday night (R. 140). Later Tuesday night he slept. Wednesday morning he was questioned again, until he confessed (R. 140). Questioning was of long duration, and was conducted and threats were made by a series of officers (R. 74, 140, 164).

Continuous interrogation has been deemed an important factor in evaluating whether a confession has been coerced, *Chambers* v. *Florida*, 309 U. S. 227, 231; *Ward* v. *Texas*, 316 U. S. 547, 555; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 154; *Haley* v. *Ohio*, 332 U. S. 596, 600; *Turner* v. *Pennsylvania*, 338 U. S. 62, 64.

was taken into the electric chair room and threatened with death in the electric chair[14] and was offered the hope and promise that if he confessed he would save his life from the chair;[15] that while held there he was stripped naked and photographed, and had his spine tapped and blood taken from his arm against his will.[16] Further inquiry would have developed that petitioner was mentally unstable (R. 105, 121-122, 124), and came from a poverty stricken home (R. 107), and was therefore even more likely to capitulate than the ordinary otherwise disadvantaged seventeen year old Negro youth in his plight.

Almost every aspect of the treatment which petitioner received at Kilby is found in the leading cases in this Court condemning exaction of involuntary confessions. Virtually each form of the pressure employed has been condemned by this Court.[17] In combination, petitioner submits, they formed an irresistible pattern.

Mute testimony that petitioner was subjected to illegal coercion at Kilby is given by the State's unwillingness

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[14] In *Wilson v. Louisiana*, 341 U. S. 901, aff'g 217 La. 470, 46 So. 2d 738, petitioner had been brought into the electric chair room in the course of obtaining a confession from him. However, the Louisiana Court noted that the electric chair was not visible and that there was no evidence that it had the effect of intimidating petitioner there. Cf. *State* v. *Auguste*, 50 La. Ann. 488, 23 So. 612 (1898) (prisoner interrogated in presence of gallows, confession held coerced).

[15] A lighter penalty is one of the inducements which was offered in *Leyra* v *Denno*, —— U. S. ——, 98 L. ed. (Adv. 631, 633). As Mr. Justice Minton wrote, at p. 645 (concerning the first confession in Leyra): such "threats, cajoling, and promises of leniency * * * to induce petitioner to confess were soundly condemned * * * "

[16] The effect of similar treatment was noted in *Malinski* v. *New York*, 324 U. S. 401, 403, 407. Also see *Rochin* v. *California*, 342 U. S. 165, 173, 174, 179.

[17] Footnotes 9 through 16 cite only some of the cases in this Court in which it has been held that confessions were coerced because of practices such as those used here.

even to attempt to introduce a "confession" (R. 58, 64-65) which was apparently made before he was removed to the City Jail.

Transfer of petitioner from one jail to another on Wednesday morning so that he might be identified by prosecutrix clearly did not alleviate his condition. No appreciable time had elapsed.[18] He was still in police custody. He was still incommunicado.[19] He labored under the crushing burden of having already confessed.[20] He was confronted by prosecutrix accusing him of a frightful crime. His age, education and mental condition were no different. It does not appear that any significant change in circumstances occurred. Neither did any significant change in circumstances occur prior to his confessing to the psychiatrist,[21] or to witness Clark.[22] But even apart from the factual showing that his situation was the same, such a confession remains coerced as a matter of law

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[18] The time gap cannot be ascertained with precision, but it was no more than a few hours. We know petitioner was questioned on Wednesday morning at Kilby (R. 140), that the ride from Montgomery to Kilby is about 15 minutes (R. 140); that prosecutrix went out to the City Jail at 11:00 (R. 57).

[19] His parents were not permitted to see him until late Wednesday afternoon (R. 102-103, 116, 117, 141).

[20] As Mr. Justice Jackson wrote in *United States* v. *Bayer*, 331 U. S. 532, 540, once an accused has confessed, "no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed." In *U. S.* v. *Bayer*, the Court weighed a time lapse of six months and concluded that this length of time in conjunction with only a modicum of restraint vitiated a previous inducement to confess. See Mr. Justice Rutledge's concurring opinion in *Malinski* v. *New York*, 324 U. S. 401, 420, 428; Mr. Justice Murphy's dissenting opinion in *Lyons* v. *Oklahoma*, 322 U. S. 596, 605, 606.

[21] A day had elapsed and he had seen his mother (R. 144, 102-103).

[22] Clark thinks he saw petitioner on the 17th (R. 75).

unless the State comes forward to overcome the presumption created by the undisputed facts. Mr. Justice Minton stated the general rule when he wrote:

> "As in the case of other forms of coercion and inducement, once a promise of leniency is made a presumption arises that it continues to operate on the mind of the accused. But a showing of a variety of circumstances can overcome that presumption. The length of time elapsing between the promise and the confession, the apparent authority of the person making the promise, whether the confession is made to the same person who offered leniency, and the explicitness and persuasiveness of the inducement are among the many factors to be weighed." *Leyra* v. *Denno*, —— U. S. ——, 98 L. ed. (Adv. 631, 645, 647).[23]

The State produced nothing. The record shows that there was no change in conditions that makes any legal difference.

Because of the introduction into evidence of these coerced confessions, or any of them,[24] the judgment below must fall.

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[23] III Wigmore § 855, states: "* * * the general principle is universally conceded that the *subsequent ending* of an improper inducement *must be shown*; *i. e.* it is assumed to have continued until the contrary is shown." (Italics in original). See also Mr. Justice Rutledge's concurence in *Malinski* v. *New York*, 324 U. S. 401, 420, 428; Mr. Justice Murphy's dissenting opinion in *Lyons* v. *Oklahoma*, 322 U. S. 596, 605, 606.

[24] *Stroble* v. *California*, 343 U. S. 181, 190; *Malinski* v. *New York*, 324 U. S. 401, 402, 404; *Lyons* v. *Oklahoma*, 322 U. S. 596, 597 note 1.

B.

Even if the confessions were not coerced as a matter of law, due process was denied in that the confession issue was not "fairly tried and reviewed": The jury which heard the confessions was not permitted to hear the relevant and important testimony offered by petitioner concerning their exaction.

In Point A, *supra*, petitioner demonstrated by undisputed facts that this conviction rests upon confessions obtained contrary to due process of law. Petitioner submits in this section that error was compounded by the trial court's refusal to permit the jury to hear evidence of how the confessions were exacted.

Following the State's case, petitioner began to testify concerning the pattern of coercion which commenced at Kilby on Monday and continued through Wednesday morning when he confessed, just prior to being brought before prosecutrix. The court stopped him before he completed testifying about Monday. Thereupon petitioner made the proffer which appears on page 11, *supra*.

The trial court refused to permit the jury to hear this testimony on the ground that it did not concern events in the City Jail (R. 138, 140, 141). On review the Supreme Court of Alabama upheld the trial court.[25] Therefore, neither the trial court nor the jury nor the Supreme Court fairly considered the pattern of coercion preceding the confessions. Petitioner submits that by this procedure he

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[25] The Alabama Supreme Court considered State testimony concerning events at Kilby on Tuesday the 11th (R. 192). It deemed the events of the 11th relevant at least for purposes of the State's case, although *defense* testimony concerning the 11th had been excluded as irrelevant.

was denied his fundamental, constitutional right to have the confession issue "fairly tried and reviewed."[26]

The law has long recognized that prisoners may confess for any one of or a combination of many complex reasons. In some cases the psychology of the problem may be clear; in others obscure. But, in any case, it is fundamental "* * * that confessions vary in value according to the circumstances in which they are made."[27] The fundamental importance of the right to present evidence to the jury on the issue of voluntariness is demonstrated by the fact that in every American jurisdiction, once the jury hears a confession the defendant is permitted to put on testimony of circumstances surrounding its exaction.[28] Most jurisdictions instruct the jury to reject a

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[26] *Stein* v. *New York*, 346 U. S. 156, 182. See also Mr. Justice Burton's dissent in *Haley* v. *Ohio*, 332 U. S. 596, 607, 615: "Due process of law under the Fourteenth Amendment requires that the States use some fair means to determine the voluntary character of a confession * * *"

The issue of the right to testify concerning the exaction of a confession was raised in the *Stein* case, at pp. 173-175, but this Court held that it was not properly presented. Petitioners alleged that as a practical matter they had been prevented from presenting evidence of coercion, because if they had testified on the confession issue they would have opened themselves up to general cross-examination. The State denied this. At any rate petitioners there did not take the stand and then object to cross-examination when, in their opinion, it exceeded the bounds of due process, and therefore the issue was not before this Court.

In the case now at bar there was a *flat refusal* to permit petitioner to testify concerning relevant and weighty facts bearing on the confession.

[27] III Wigmore § 866.

[28] *Dyer* v. *State*, 241 Ala. 679, 4 So. 2d 311 (1941); *State* v. *Smith*, 62 Ariz. 145, 155, 155 P. 2d 622 (1944); *Nelson* v. *State*, 190 Ark. 1078, 1082, 83 S. W. 2d 539 (1935); *People* v. *Fox*, 25 Cal. 2d 330, 340, 153 P. 2d 729 (1944); *Diaz* v. *People*, 109 Colo. 482, 485-486, 126 P. 2d 498 (1942); *State* v. *Willis*, 71 Conn. 293, 314, 41 Atl. 820 (1898); *Williams* v. *State*, 156 Fla. 300, 303, 22 So. 2d 821 (1945); *Bryant* v. *State*, 191 Ga. 686, 711, 13 S. E. 2d 820 (1941); *State* v. *Hofer*, 238 Ia. 820, 829, 28 N. W. 2d 475 (1947);

confession which it finds to be coerced; some instruct it to consider coercion in determining what weight to give

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[28] (Continued)

State v. *Van Vlack*, 57 Id. 316, 342-343, 65 P. 2d 736 (1937); *People* v. *Roach*, 369 Ill. 95, 96, 15 N. E. 2d 873 (1938); *Mack* v. *State*, 203 Ind. 355, 373, 180 N. E. 279 (1932); *State* v. *Taylor*, 119 Kan. 260, 262, 237 Pac. 1053 (1925); *Logan* v. *Commonwealth*, 308 Ky. 259, 262-263, 214 S. W. 2d 279 (1948); *State* v. *Wilson*, 217 La. 470, 486, 46 So. 2d 738 (1950) affd. 341 U. S. 901; *Nicholson* v. *State*, 38 Md. 140, 155 (1873); *Comm.* v. *Sheppard*, 313 Mass. 590, 604, 48 N. E. 2d 630 (1943) cert. den. 300 U. S. 213; *State* v. *Grover*, 96 Me. 363, 366, 52 A. 757 (1902); *People* v. *Dudgeon*, 229 Mich. 26, 30, 201 N. W. 355 (1924); *State* v. *Schabert*, 222 Minn. 261, 263, 24 N. W. 2d 846 (1946); *Brooks* v. *State*, 178 Miss. 575, 582, 173 So. 409 (1937); *State* v. *Gibilterra*, 342 Mo. 577, 585, 116 S. W. 2d 88 (1938); *State* v. *Sherman*, 35 Mont. 512, 519, 90 Pac. 981 (1907); *Cramer* v. *State*, 145 Neb. 88, 97-98, 15 N. W. 2d 323 (1944); *State* v. *Cleveland*, 6 N. J. 316, 326, 78 A. 2d 560, 23 A. L. R. 2d 907 (1951); *State* v. *Vaisa*, 28 N. M. 414, 417, 213 Pac. 1038 (1923); *People* v. *Elmore*, 277 N. Y. 397, 404, 14 N. E. 2d 451, 124 A. L. R. 465 (1938); *State* v. *Kerns*, 50 N. D. 927, 940, 198 N. W. 698 (1924); *State* v. *Collett*, 58 N. E. 2d 417, 424 (Ohio) (1944); *Smith* v. *State*, 77 Okla. Crim. 142, 146-147, 140 P. 2d 237 (1943); *State* v. *Jordan*, 146 Ore. 504, 511, 30 P. 2d 751 (1934); *Comm.* v. *Van Horn*, 188 Pa. 143, 168, 41 A. 469 (1898); *State* v. *Williams*, 31 Nev. 360, 371, 102 P. 974 (1909); *State* v. *Adams*, —— R. I. ——, 121 Atl. 418, 419 (1923); *State* v. *Scott*, 209 S. C. 61, 64-65, 67, 38 S. E. 2d 902 (1946); *State* v. *Nicholas*, 62 S. D. 511, 515, 253 N. W. 737 (1934); *Wynn* v. *State*, 181 Tenn. 325, 329, 181 S. W. 2d 332 (1943); *Cavazos* v. *State*, 143 Tex. Cr. 564, 566, 160 S. W. 2d 260 (1942); *State* v. *Crank*, 105 Utah 332, 355, 364, 142 P. 2d 178, 170 A. L. R. 542 (1943); *Jackson* v. *Commonwealth*, 193 Va. 664, 674, 70 S. E. 2d 322 (1952); *State* v. *Van Brunt*, 22 Wash. 2d 103, 108, 154 P. 2d 606 (1944); *State* v. *Richards*, 101 W. Va. 136, 141, 132 S. E. 375 (1926); *Pollack* v. *State*, 215 Wisc. 200, 217, 253 N. W. 560 (1934); *Clay* v. *State*, 15 Wyo. 42, 59, 86 Pac. 17 (1906); *Wilson* v. *U. S.*, 162 U. S. 613, 624 (1896); *Witt* v. *United States*, 196 F. 2d 285, 286 (C. A. 9th, 1952), cert. den. 344 U. S. 827; *Murphy* v. *United States*, 285 F. 801, 808 (C. A. 7th, 1923), cert den. 261 U. S. 617; *Catoe* v. *U. S.*, 131 F. 2d 16, 19, 76 App. D. C. 292 (1942).

the confession.[29] But no jurisdiction has been found which keeps from the jury the circumstances surrounding the exaction of a confession which it has heard. Indeed, in Alabama the rule is that if a confession is held not to have been coerced as a matter of law, the trial court permits the jury to hear evidence concerning its exaction so that it may determine its credibility.[30] This is the English rule too.[31] But by tightly drawing the circle of relevancy the

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[29] The states are classified in 170 A. L. R. 567.

[30] *Dyer* v. *State*, 241 Ala. 679, 4 So. 2d 311 (1941); *Vernon* v. *State*, 239 Ala. 593, 196 So. 96 (1940). The jury was so charged in this case (R. 175), but, of course, it had been denied petitioner's proffered evidence and so the instruction was meaningless.

[31] A recent case in the King's Bench decided by Lord Chief Justice Goddard, contains a particularly clear discussion of the importance of the right to present evidence of involuntariness to the jury:

> "The recorder was wrong in the course which he took. It was quite right for him to hear evidence in the absence of the jury and to decide on the admissibility of the confession; and, since he could find nothing in the evidence to cause him to think that the confession had been improperly obtained, to admit it. But its weight and value were matters for the jury, and in considering such matters they were entitled to take into account the opinion which they had formed on the way in which it had been obtained. Mr. Hooper was perfectly entitled to cross-examine the police again in the presence of the jury as to the circumstances in which the confession was obtained, and to try again to show that it had been obtained by means of a promise or favour. If he could have persuaded the jury that, he was entitled to say to them: 'You ought to disregard the confession because its weight is a matter for you.'
>
> "The point, if there is any doubt about it, ought to be finally settled. * * * It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat

trial court in this case barred the proffered testimony from the jury.

This ruling was patently erroneous insofar as it denied petitioner the right to testify concerning the confession—about which prosecutrix had testified—(R. 58, 64-65) which was made immediately following the coercion at Kilby.

And certainly reasonable men knowing all the facts, could have concluded that the subsequent confessions were coerced, even if *arguendo*, by moving petitioner to the City Jail the State escaped the consequences of coercion at Kilby *as a matter of law*.[32] But the jury here was prevented from knowing all the facts, and could not fairly try the issue.

Depriving the jury of this testimony may not have only influenced the issue of guilt, it may have meant the difference between the death penalty and a term of years which the jury was free to impose.[33]

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[31] (Continued)

> or promise, its value will be enormously weakened. The weight and value of the evidence are always for the jury." *Rex* v. *Murray*, 1 K. B. 391 (1951).

In *Rex* v. *Murray* the recorder also charged the jury that they were not to consider the circumstances under which the confession was obtained. But that does not make it unlike this case, for here, although the jury received a charge on credibility it was not permitted to hear the evidence.

[32] See, the opinion of Mr. Justice Minton dissenting in *Leyra* v. *Denno*, —— U. S. ———, 98 L. Ed. (Adv. 631, 645, 646): It is "* * * the very essence of due process to submit to a jury the question of whether these later confessions were tainted by the prior coercion and promises. * * *"

See also, *Lyons* v. *Oklahoma*, 322 U. S. 596, 603: Evidence of coercion, such as that offered by petitioner here must "[O]f course * * * be considered in appraising the character of the later confession."

[33] Cf. *U. S. ex rel. Almeida* v. *Baldi*, 195 F. 2d 815, 819-820 (C. A. 3d, 1952).

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The jury heard the confessions and heard of them. It heard some State's evidence that they had been farily obtained. But it was denied defendant's proffered testimony of an entire pattern of coercion bearing heavily on their credibility. Those opinions in this Court, both majority or dissenting, which have approved the admission of confessions in particular cases have frequently stressed that the matter was fairly tried and reviewed below because the triers had seen the witnesses and had heard all of the evidence of both sides concerning exaction of the confession. This record is bare of any semblance of such fair procedure.

In another context Mr. Justice Jackson condemned "a curtailment which keeps from the jury relevant and important facts bearing on the truthworthiness of crucial testimony," *Gordon* v. *United States*, 344 U. S. 414, 423. The curtailment here of testimony bearing on a constitutional claim was of even greater gravity. For these reasons, petitioner submits that the confession issue was not fairly tried and reviewed, and that therefore the judgment below must fall.

C.

The Supreme Court of Alabama erred in holding that even if the confessions were coerced, the decision in *Stein* v. *New York*, 346 U. S. 156 permitted affirmance because there was sufficient evidence apart from the confessions upon which the conviction could have been based.

The Alabama Supreme Court concluded that even if the confessions were coerced, there was no error because there was enough evidence to convict without the confessions. In this it relied upon *Stein* v. *New York*, 346 U. S. 156. It wrote:

> "In considering all the evidence, * * * and the finding of the Court, * * * that the statements were voluntary, we cannot say that the admission of these statements was reversible error. Moreover, the admissions to the prosecutrix and the confession to Dr. Bazar did not form the basis of a conviction. The State had established the identity of this defendant as the perpetrator of the crime by very convincing proof 'and the matter of confession was but cumulative and approached what might properly be termed supererogation * * *' *Johnson* v. *State*, 242 Ala. 278, 5 So. 2d 632, cert. den. 316 U. S. 693, 713, or as stated in *Stein* v. *New York, supra*. 'Here the evidence of guilt * * * is enough apart from the confessions so that it could not be held constitutionally or legally insufficient to warrant the jury verdict' " (R. 192).

In this, petitioner submits, the Alabama Supreme Court misinterpreted *Stein* v. *New York*.[34]

In the *Stein* case the opinion for the court held that the confessions were not coerced as a matter of law.[35] It then proceeded to consider the possibility that despite this *legal* conclusion, the jury, nevertheless, found the confessions coerced as a matter of fact. This, of course, could only be an assumption, for no one could know what the jury, in finding a general verdict, thought of the confession issue; or indeed, whether there was unanimity among the jurors on this particular point. Proceeding on the *assump-*

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[34] Even if it were correct in its interpretation of the *Stein* case, the judgment below must fall, for the case against petitioner consists wholly of the confessions and prosecutrix's identification of petitioner which was the fruit of the confession. See p. 5, *supra*. Compare *Stein* v. *New York*, 346 U. S. 156, 163, n. 6 where the identification was held to be fair.

[35] *Stein* v. *New York*, 346 U. S. 156, especially pp. 179-188.

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tion that the jury found the confession coerced, the Court held that this assumed finding was not subject to review. However this does not mean that the trial court's and the State Supreme Court's ruling is not subject to review, or that their error may be disregarded because other evidence sufficient to convict is in the record.[36] Therefore, the *Stein* case did not hold that the State may introduce confessions coerced as a matter of law and sustain a conviction upon other evidence.

This case differs from the *Stein* case in fundamental respects. (1) Here, unlike in the *Stein* case, the confessions were coerced as a matter of law. (2) In the *Stein* case, where the jury heard evidence concerning the method by which the confessions were obtained, the confession issue was held to have been fairly tried and reviewed. Petitioner there, despite his claim to the contrary, had not been prevented from testifying concerning exaction of the confessions. Here petitioner was so prevented and the jury was denied such evidence. Thus, the confession issue in the instant case was not fairly tried or reviewed.

Petitioner submits that the language in the *Stein* opinion which contributed to the erroneous inference of the Alabama Supreme Court was generated by the issues raised in the *Stein* case relating to a requested instruction for acquittal if the jury found that the confessions were coerced. Petitioner respectfully suggests that close analysis of the issues raised by the requested instruction will indicate that the Court, in disposing of those issues, had no intention of departing from the long-established rule that a conviction tainted by a coerced confession must be set aside.

A request for an instruction of acquittal automatically called for an appraisal of all the evidence, for such an

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[36] See, Note, The Supreme Court, 1952 Term, 67 Harv. L. Rev. 91, 120 (1953).

instruction could be complied with only if the evidence apart from the confession was inadequate to sustain a conviction. The requested instruction therefore involved a two-step operation: (1) an appraisal of the voluntariness of the confession; (2) if it was found involuntary, an appraisal of the rest of the evidence. When such other evidence was weighed in the *Stein* case it appeared that petitioners there could have suffered no prejudice by the denial of their requested instruction, because there was sufficient other evidence. That issue is not involved here. Petitioner here does not demand a mandatory acquittal. Petitioner here requests a new, fair trial.

Petitioner recognizes that the dissenting opinions in the *Stein* case expressed serious doubts as to whether the majority opinion effectively erased the rule that a coerced confession requires a new trial. Petitioner suggests that no such drastic intention can be attributed to the majority where the opinion discloses no express overruling of the unwavering line of cases whose rule has been reiterated as recently as *Brown* v. *Allen*, 344 U. S. 443, 475.[37] If there were any doubt on this score, it must have been set at rest by this Court's application of the conventional rule —since *Stein*—in *Leyra* v. *Denno*, —— U. S. ——, 98 L. ed. (Adv. 631) where this court, having found a confession to have been coerced, summarily reversed the judgment below without appraising the evidence other than the tainted confession.

The rule which the Alabama Court employed would wipe out an accused's protection against the introduction of coerced confessions and has never been adopted by this Court.

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[37] e.g. *Malinski* v. *New York*, 324 U. S. 401, 404; *Stroble* v. *California*, 343 U. S. 181, 190, 191; *Lyons* v. *Oklahoma*, 322 U. S. 596, 597; *Haley* v. *Ohio*, 332 U. S. 596, 599; *Gallegos* v. *Nebraska*, 342 U. S. 55, 63.

II

There was systematic exclusion of Negroes from the venire in that the commissioners employed a selection method whereby it was "particularly hard" for Negroes to become jurors if the commissioners did not personally know them; commissioners knew fewer Negroes than whites; and although the Negro population of Montgomery County is 43.6%, panels contained only 0% to 8.5% Negroes.

The state used a system of jury selection which had to result in systematic exclusion of Negroes from juries, and which, in fact, resulted in such exclusion contrary to the Fourteenth Amendment of the United States Constitution and Title 18 U. S. C. § 243.

The Alabama statute which sets the qualifications of jurors requires, with a few exceptions, that jurors shall be "male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment • • • " (R. 33). It further directs that the commission clerk who "is charged with the duty of seeing" that the names of all qualified persons are placed in the jury box, "scan the registration lists,[38] the lists returned to the tax assessor, any city directories, telephone directories, and any and every other source of information from which he may obtain information • • • " (30 Code of Ala. § 24 (1940)). However, the jury commissioners limited the names in the box to persons whom they knew personally (R. 28-29, 37) or to persons whose names they had obtained from individuals or organizations with whom they were personally acquainted (R. 28-29, 33, 37).

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[38] Petitioner made several efforts to ascertain whether the voting list was employed, but this was ruled out as irrelevant (R. 31).

As Mr. Justice Reed pointed out in *Cassell* v. *Texas*, 339 U. S. 282, 288, one might expect that in a community like Montgomery the opportunity for white jury commissioners to have personal acquaintanceship with Negroes is limited. This was the case here and the commissioners so testified. They knew few Negroes (R. 29, 37) and with one vague exception did not know any Negro clubs or go to them for names (R. 33, 36), although they obtained names from almost every white club in the county (R. 33). Although they testified that they made efforts to obtain names of "high class" or "good" Negroes (R. 29, 36, 38) their success does not appear to be much better (R. 29, 36, 37, 40, 42) than that discussed in *Hill* v. *Texas*, 316 U. S. 400, 402, or *Cassell* v. *Texas*, 339 U. S. 282, 288, fn. 23, where avowedly diligent, but unsuccessful efforts to obtain Negroes on a personal basis did not avoid condemnation by this Court. Among the Negroes from whom they testified they requested names (R. 29, 36, 37, 40, 42), the record reveals only one clear instance of names having been furnished (R. 29).

A commissioner testified that it was "particularly hard" to place Negroes' names in the box "without knowing them" (R. 29), and the composition of the panels reflects this difficulty. No more than 8½% of the members of any panel were ever Negroes,[39] and this is an optimum, not a

[39] This figure is derived by assuming a panel of thirty-five persons (R. 30), including three Negroes (R. 30). Since there are panels with no Negroes (R. 35) and panels with fewer than three (R. 30, 34-35), and since fifty jurors are called for each panel (R. 30), although as few as thirty-five may show up, the figure of 8½% is an optimum one. (Jury Commissioner Carter's explicit testimony that he had never seen more than three Negroes on a panel (R. 30) seems to rob of statistical significance his later casual remark that there have sometimes been as many as 3 or 4 at one time (R. 35). However, even assuming for purposes of argument that there have ever been as many as four Negroes on a panel, this can make but a negligible difference in the resultant arithmetic and can make no difference whatsoever in the legal conclusions to be drawn therefrom.)

typical situation, which construes ambiguities in favor of the State. There have been panels with no Negroes (R. 35) and panels with fewer than three (R. 30, 34-35). In this case, a commissioner testified, there was one Negro on the jury panel (R. 34-35). Compared with a Negro population of 43.6% [40] in the County, which presumably was as qualified as the white population for jury service, *Hill* v. *Texas*, 316 U. S. 400, 404, the disparity is shocking. But given the system of selection, it was inevitable.

Thus, the case falls under the ban of *Cassell* v. *Texas*, *supra*, and *Avery* v. *Georgia*, 345 U. S. 559.

There were several opinions in the *Cassell* case and each discusses factors relevant to this case and condemns the practice or result which exists in this case. Mr. Justice Reed's opinion noted petitioner's charge there "that discrimination must have been practiced because the Negro proportion of grand jurors (6.7%) is less than the Negro proportion of the county's population," which was about 15.5%, *Cassell* v. *Texas*, *supra* at pages 284-285. However, the disparity was perhaps explainable by the fact that a grand juror in Texas must possess certain statutory qualifications: eligibility to vote (which requires poll tax payment); he must be a freeholder or householder; he must be of sound mind and good character; he must be literate. The poll tax requirement alone reduced the number of eligible Negroes to 6.5%, "a percentage approximately the ratio of Negroes actually sitting on the 21 grand jury panels." *Id.* at pages 285-286. Therefore, Mr. Justice Reed concluded that "[w]ithout more it cannot be said that Negroes had been left off grand jury panels to such a degree as to establish a prima facie case of discrimination." *Id.* at page 286.

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[40] Montgomery County has a total population of 138,965 of which 60,592, or 43.6% is Negro. 1950 Census of Population, Vol. II, Characteristics of Population, Part 2, p. 2-87.

In this case the disparity is more glaring (0%-8.5% on panels compared to 43.6% in population) and is not explainable in terms of other factors. There is no voting requirement; there is no property requirement; there is not even a literacy requirement (R. 46). The only requirement which explains the disparity is one imposed by the commissioners themselves: a juror must be an acquaintance of a commissioner or must be recommended by a person or organization that the commissioner knows, where these sources are almost exclusively white.

However, Mr. Justice Reed did condemn the *Cassell* grand jury on grounds that are pertinent here. The system of selection in the *Cassell* case was based on personal acquaintanceship. The commissioners testified that they knew no available qualified Negroes, which was substantially the case here. Mr. Justice Reed therefore held:

> "The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area where Negroes made up so large a proportion of the population, prove the intentional exclusion that is discrimination in violation of petitioner's constitutional rights." *Id.* at page 290.

Mr. Justice Frankfurter condemned the jury discrimination in the *Cassell* case on grounds equally pertinent here. He did not disapprove of the method of selection although he pointed out that "[a] different situation would be presented by an unquestioned showing that jury commissioners had such a limited personal knowledge of potentially qualified Negro jurors that their purposeful limitation of choice to the negligibly few Negroes known to them would inevitably imply designed exclusion of eligible Negroes." *Id.* at pages 292-293.

However, he held where "one factor is uniform in a continuing series of events that are brought to pass

through human intervention, the law would have to have the blindness of indifference rather than the blindness of impartiality not to attribute the uniform factor to man's purpose", *Id.* at page 293. In the *Cassell* case, no more than a single Negro on twenty-one consecutive panels was such a uniform factor. Therefore, Mr. Justice Frankfurter concluded, the decision below should be reversed.

Here, there is such a persistent limitation also. In fact, the exclusion is more than twice as severe as that practiced in the *Cassell* case [41] with none of the possible justifications which Mr. Justice Reed found there. Therefore, under Mr. Justice Frankfurter's opinion in the *Cassell* case, the judgment here must also fall.

Mr. Justice Clark, in a concurring opinion in the *Cassell* case condemned the method of selection in terms equally applicable to this case:

> "The record indicates clearly that there were Negroes qualified and available whom the commissioners did not know but whom upon inquiry they should have considered. Their responsibility was to learn whether there were persons among the Negroes they did not know who were qualified and available for service. *Hill* v. *Texas,* 316 U. S. 400; *Smith* v. *Texas,* 311 U. S. 128. The elimination of this large group in the community from the commissioners' consideration deprived petitioner of constitutional safeguards as defined in the decisions of this Court." *Id.* at page 298.

Avery v. *Georgia,* 345 U. S. 559 is further authority for petitioner's position. There, although there was no direct

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[41] Although the ratio of Negroes to whites in Montgomery is almost three times as great as that in Cassell (43.6% : 15.5%), the proportion of Negroes on jury panels is almost the same (8.5% maximum: 6.7%).

evidence that Negroes had not been selected for jury service because of race, the system made exclusion possible by employing different colored cards for white and colored jurors. The late Chief Justice Vinson held the system unconstitutional because it facilitated discrimination and because the commissioners did not follow a non-discriminatory course of conduct:

> The jury commissioners, and the other officials responsible for the selection of this panel, were under a constitutional duty to follow a procedure—"a course of conduct"—which would not "operate to discriminate in the selection of jurors on racial grounds." *Hill* v. *Texas*, 316 U. S. 400, 404. If they failed in that duty, then this conviction must be reversed—no matter how strong the evidence of petitioner's guilt. That is the law established by decisions of this Court spanning more than seventy years of interpretation of the meaning of "equal protection."
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> Petitioner's charge of discrimination in the jury selection in this case springs from the Jury Commissioners' use of white and yellow tickets. Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate. Further, the practice has no authorization in the Georgia statutes—which simply enjoin the Commissioners to select "upright and intelligent men to serve as jurors * * *"

The characteristics which condemned the system in the *Avery* case also doom the system here. They make discrimination easier. They require following a course of conduct which operates to discriminate. They have no authorization in the Alabama statutes. They cause exclusion in fact.

When all this is coupled with the trial judge's ruling that petitioner could not examine the jury box to ascertain the number of colored jurors and to test the general assertions of non-discrimination by the commissioners,[42] (R. 27-28, 34) the conclusion that this is an illegal method is reenforced. Such a combination—jurors chosen on the basis of personal acquaintanceship, and denial of opportunity to examine the jury box—provides the means sought by those who would discriminate. In combination they would permit circumvention of more than seventy years' holdings in this Court. *Avery* v. *Georgia* made clear that this Court would countenance no subterfuge or form of evasion where this constitutional right is involved.

Therefore for the systematic exclusion of Negroes from the jury the judgment below must also fall.

III

Arbitrary exclusion of the general public from all phases of petitioner's trial denied due process of law.

Petitioner submits that he was denied due process of law in that the general public was excluded from his trial. Petitioner further submits that the ban included a time, when, as subsequent events proved, the presence of the public was most necessary: during the *voir dire* when the Chief of Police of the Montgomery Reserve Police Force became a juror, after failing to disclose this aspect of his occupation, when the State knew of his police affiliation and defendant did not (R. 173-177).

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[42] The trial court was authorized to permit the jury rolls to be used in evidence. *State* v. *Miller*, 204 Ala. 234, 236, 85 So. 700 (1920) and cases cited therein.

At the very outset of the proceedings below, over petitioner's constitutional objection, the court excluded the public from the courtroom (R. 2, 10). Originally his relatives (R. 14-15, 19), and the press (R. 3, 11) were excluded along with the rest of the public; however, in response to further objections (R. 15, 22) they were later admitted. Losing on his objection to the exclusion of the general public, petitioner moved that it be limited to the time when prosecutrix testified (R. 15, 20). This too was denied (R. 15). He appealed the permanent exclusion from all phases of the trial to the State Supreme Court on Federal Constitutional grounds, but the appellate court upheld the trial court without discussing the matter.[43]

The right to a public trial, explicitly set forth in the Sixth Amendment and in corresponding provisions of almost every state constitution [44] is one of the most ancient and deep rooted rights of an accused in our legal tradition.[45] It has variously been attributed to immemorial common law usage, historical accident, aversion to Star Chamber proceedings, and reaction to the procedures of the Inquisition,[46] but whatever its origin, the right is so widely and uniformly recognized that it may fairly be described as fundamental. Throughout the English speak-

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[43] See note 2, *supra*.

[44] See note 47, *infra*.

[45] *Re Oliver*, 333 U. S. 257, 266-270.

[46] Note, 49 Col. L. Rev. 110, 111, 115 (1949). See also *Re Oliver*, op. cit. *supra* n. 45 at pages 266-271.

ing world it is not disputed that a trial must be public.[47] It is thus apparent that the right to a public trial is "implicit in the concept of ordered liberty" which is due process of law, *Palko* v. *Connecticut*, 302 U. S. 319, 325. Indeed, this Court expressed its own concurrence in the

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[47] The United States, forty-six states, and at least four members of the British Commonwealth recognize the right.

The United States, and forty-one states recognize it by constitution:

United States Constitution, Sixth Amendment.

Alabama Const. Art. I, §6; Arizona Const. Art. II, Section 24; Arkansas Const. Art. II, Section 10; California Const. Art. I, Section 13; Colorado Const. Art. II, Section 16; Connecticut Const. Art. I, § 9; Delaware Const. Art. I, § 7; Florida Const., Declaration of Rights, Section 11; Georgia Const. Art. I, § 2-105; Idaho Const. Art. I, § 13; Illinois Const. Art. II, § 9; Indiana Const. Art. I, § 13; Iowa Const. Art. I, Section 10; Kansas Const., Bill of Rights, § 10; Kentucky Const. Section 11; Louisiana Const. Article I, § 9; Maine Const. Art. I, Section 6, Michigan Const. Art. II, §19; Minnesota Const. Art. I, §6; Mississippi Const. Art. 3, §26; Missouri Const. Art. I, §18(a); Montana Const. Art. III, §16; Nebraska Const. Art. I, §11; New Jersey Const. Art. I, Par. 10; New Mexico Const. Art. II, §14; North Carolina Const. Article I, §13; North Dakota Const. Art. I, §13; Ohio Const. Art: I, §10; Oklahoma Const. Art. II, §20; Oregon Const. Art. I, §11; Pennsylvania Const. Art. I, §11; Rhode Island Const. Art. I, §10; South Carolina Const. Art. I, §18; South Dakota Const. Art. VI, §7; Tennessee Const. Art. I, §9; Texas Const. Art. I, §10; Utah Const. Art. I, §12; Vermont Const., Ch. I, Art. 10; Washington Const. Art. I, §22; West Virginia Const. Art. III, §14; Wisconsin Const. Art. I, §7.

2 States recognize it by statute: Nev. Comp. Laws Ann. §10654 (1929); 29 McKinney's Cons. Laws of New York, §4.

3 States recognize it inferentially by judicial decision. *Dutton* v. *State*, 123 Md. 373, 386-388, 91 A. 417 (1914); *Commonwealth* v. *Blondin*, 324 Mass. 564, 569, 87 N. E. 2d 455 (1949); *State* v. *Holm*, 67 Wyo. 360, 394, 224 F. 2d 500 (1950).

England:

Scott v. *Scott*, [1913] A. C. 417, 435, 439; *Mahlikilili Dahlamini* v. *The King* [1942] A. C. [P. C.] 583, 590.

Canada:

McPherson v. *McPherson* [1936] A. C. 177, 1 D. L. R. 321.

Australia:

R v. *Hamilton*, [1930] 30 S. R. N. S. W. 277, 278; 47 N. S. W. W. N. 84.

South Africa:

R v. *Ladbrooke* [1931] N. L. R. 475.

sanctity of the public trial as an aspect of due process in *Re Oliver*, 333 U. S. 257, 273, where this Court noted "this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public * * *"

But petitioner does not rest merely on this broad assertion, for the metes and bounds of the public trial guarantee have been defined more precisely by long and almost universal usage. Thus, there are judicial decisions which recognize that the court may be cleared of unruly persons,[48] and that when the courtroom is filled no additional persons need be admitted.[49] Minors may occasionally be excluded.[50] There are jurisdictions which provide that the court may be cleared during the testimony of a witness such as a minor prosecutrix, who may be unable to testify before a large audience[51] or during the testimony of a

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[48] *State* v. *Scruggs*, 165 La. 842, 870, 116 So. 206 (1928); *State* v. *Genese*, 102 NJL 134, 142, 130 Atl. 642 (1925); *Grimmett* v. *State*, 22 Tex. Cr. 36, 40-41, 2 S. W. 631 (1886); *Doyle* v. *Commonwealth*, 100 Va. 808, 40 S. E. 925 (1902); Archbold's Criminal Pleading, Evidence & Practice 173-174 (31st Edn. 1943).

[49] *State* v. *Saale*, 308 Mo. 573, 580, 274 S. W. 393 (1925). But there may be a duty to provide reasonable accommodations, see *State* v. *Hensley*, 75 Ohio St. 255, 263, 79 N. E. 462 (1906). In Canada it has been held that there is a duty to hold even civil proceedings in a place from which the public will not be deterred, albeit it is not the intention of the court to exclude the public. *McPherson* v. *McPherson*, [1936] A. C. 177, 1 D. L. R. 321.

[50] See *U. S.* v. *Kobli*, 172 F. 2d 919, 923 (C. A. 3d, 1949); *State* v. *Osborne*, 54 Ore. 289, 292, 103 P. 62 (1909); Ky. Rev. Stats. §455.130 (Baldwin's 1943 Rev. Ed.); Nevada Comp. Laws 1929, §8404; Wisc. Stats. §256.14 (1951); Minn. Stat. Ann. §631.04 (1947); Children and Young Persons Act (1933) (23 Geo. 5, C. 12) §36.

[51] *Hogan* v. *State*, 191 Ark. 437, 86 S. W. 2d 931; *Beauchamp* v. *Cahill*, 297 Ky. 505, 508, 180 S. W. 2d 423 (1944); *State* v. *Callahan*, 100 Minn. 63, 67, 110 N. W. 342 (1910); Gen. Stats. No. Car. (Recompiled 1953) §15.166; *State* v. *Damm*, 62 S. D. 123, 130, 252 N. W. 7 (1933); *Grimmett* v. *State*, 2 S. W. 631. Archbold, Criminal Pleading, Evidence & Practice 174, 991-992 (31st Ed. 1943); *R* v. *Ladbrooke*, [1931] N. L. R. 475, 476 (South Africa).

witness who fears he may be harmed.[52] Probably, even those jurisdictions which have been most outspoken in defense of the right to a public trial would permit its limitation in at least some of these circumstances.[53] But except in the case of such limited reasonable instances we find that in the preponderant number of jurisdictions there are no examples of courts sanctioning exclusion of the public from criminal proceedings.

In thirty-four states and three Federal Circuits (the only Circuits to pass on the question) petitioner has found no instances of exclusion of the public from criminal trials except for a limited time and for ends related to the orderly and fair administration of justice,[54] examples of which

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[52] *Commonwealth* v. *Principatti*, 260 Pa. 587, 598, 104 Atl. 53 (1918). Cf. *The King* v. *Governor of Lewes Prison, ex parte Doyle* 2 K. B. 254, 272 (1917).

[53] *E. g., United States* v. *Kobli, supra*, at pages 922-923.

[54] The cases and statutes cited in this footnote indicate, so far as petitioner has been able to find, the outer limits to which each of these thirty-four jurisdictions has permitted or will permit exclusion of the public from criminal trials:

United States v. *Kobli*, 172 F. 2d 919 (C. A. 3d, 1944) (Mann Act, court cleared of all persons except jurors, witnesses, lawyers, press, reversed); *Tanksley* v. *United States*, 145 F. 2d 58 (C. A. 9th, 1944) (rape, court cleared except for parties, counsel, officers of the law, press, relatives of defendant, reversed); *Davis* v. *United States*, 247 F. 394 (C. A. 8th, 1917) (train robbery, court crowded, tension; court cleared except for defendants' relatives, lawyers, press; reversed).

Twenty-one of these states have decided cases or statutes bearing on this point:

Ark.: *Hogan* v. *State*, 191 Ark. 437, 86 S. W. 2d 931 (1935) (court cleared during testimony of embarrassed minor prosecutrix, proper); Cal.: *People* v. *Hartman*, 103 Cal. 242, 37 P. 153 (1894) (rape, all persons excluded during entire trial, reversed); Ky.: *Beauchamp* v. *Cahill*, 297 Ky. 505, 180 S. W. 2d 423 (1944) (contributing to delinquency of minor female, lawyer had right to be present at trial of case related to one in which he is involved; court says it can exclude public during testimony of child witness), Ky. Rev. Stat. Baldwin 1943 Rev. Ed.) §455.130 (children can be excluded during rape trial); Mich.: *People* v. *Yeager*, 113 Mich. 228, 71 N. W. 491 (1897) (assault with intent to rape, all persons excluded except friends and relatives of defendant, reversed; statute permitting ex-

[54] (Continued)

clusion unconstitutional under State Constitution); Mich. Stat. Ann. (1935) Sec. 27.465 (minors can be excluded during indecent testimony); Minn.: *State* v. *Callahan*, 100 Minn. 63, 110 N. W. 342 (1910) (temporary exclusion during embarrassed prosecutrix's testimony proper, but order clearing court throughout trial would have been error); Minn. Stat. Ann. (1947) Sec. 631.04 (minors may be excluded); Mo.: *State* v. *Brooks*, 92 Mo. 542, 5 S. W. 257 (1887) (unauthorized persons excluded public, trial judge ordered public admitted; if he had refused to issue order, or refused request to reexamine jurors selected while public out, would have been error); Mont.: *State* v. *Keeler*, 52 Mont. 205, 156 P. 1080 (1916) (rape, public excluded, except for court officers, lawyers, doctors, reporters, during one day of trial, reversed); Neb.: *Rhoades* v. *State*, 102 Neb. 750, 169 N. W. 433 (1918) (public excluded during testimony of prosecutrix, reversed); Nev.: Nevada Comp. Laws 1929 §8404 (minors may be excluded); N. J.: *State* v. *Genese*, 102 N. J. L. 134, 130 Atl. 642 (1925) (disorderly members of public ejected, proper); N. C.: Gen. Stats. of North Carolina (Recompiled 1953) Sec. 15.166 (in rape trials public may be excluded during testimony of prosecutrix); Ohio: *State* v. *Hensley*, 75 Ohio St. 255, 263, 79 N. E. 462 (1906) (rape, public excluded during taking of "immoral" testimony, press remains, reversed); Okla.: *Neal* v. *State*, 86 Okla. Cr. 283, 192 P. 2d 294 (1948) (prostitution, public excluded, reversed); Ore.: *State* v. *Osborne*, 54 Ore. 289, 103 P. 62 (1909) (public excluded, reversed); Penna.: *Commonwealth* v. *Principatti*, 260 Pa. 587, 598, 104 Atl. 53 (1918) (murder, exclusion during testimony of frightened witness would have been proper); S. C.: *State* v. *Adams*, 100 S. C. 43, 84 S. E. 368 (1915) (bastardy, exclusion of boys and Negroes (!) proper); S. D.: *State* v. *Davis*, 62 S. D. 123, 252 N. W. 7 (rape, public excluded during testimony of embarrassed, frightened, minor prosecutrix, approved); Tex.: *Grimmett* v. *State*, 22 Tex. Cr. 36, 2 S. W. 631 (1886) (exclusion during testimony of embarrassed minor prosecutrix, laughter in courtroom, proper); Utah: *State* v. *Bonza*, 72 Utah 177, 269 P. 480 (1928) (rape, public excluded, statute permitting this violates state constitution, reversed); Wash.: *State* v. *Marsh*, 126 Wash. 142, 217 P. 705 (1923) (contributing to delinquency of minor, public excluded, reversed); Wisc.: Wisc. Stats. §256.14 (1951) (minors may be excluded).

Thirteen states—Conn., Del., Ill., Ind., Ia., Kan., Me., N. H., N. M., R. I., Tenn., Vt., W. Va.—have neither cases nor statutes which substantially bear on the meaning of the words "public trial" in criminal cases. However, as to them one may properly assume that absence of litigation indicates absence of exclusion in fact, for all but one of these (New Hampshire) guarantee public trials, see note 47, *supra*, and if exclusion were practiced it would present a colorable issue which one might expect to be litigated at least once.

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were given above (see pp. 42-43, *supra*). Nor are these outer limits on the power to exclude exceeded in England,[55] Canada,[56] Australia [57] and South Africa.[58]

Two states, included among the thirty-four above have held that statutes which restrict the right to a public trial are unconstitutional under their state constitutions.[59]

The situation in the remaining fourteen states is not uniformly clear. However, in fact, only six states have upheld an actual blanket exclusion of the public from all phases of a trial over a defendant's objection.[60]

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[55] Archbold's Criminal Pleading, Evidence & Practice (31st Edn. 1943), pages 173-174. (Trial must be in open court but in certain classes of cases court may exclude women and young persons or eject persons who disturb proceedings; while child testifies in case of offense against decency court may be cleared); 8 Halsbury's Laws of England (2d edn.) 526-527; *Scott* v. *Scott*, [1913] A. C. 417 (H. L.); *Mahlikilili Dahlamini* v. *The King* [1942] A. C. 583 [P. C.]; *Daubney* v. *Cooper*, 10 B & C 237, 240 (1829); *The King* v. *Governor of Lewes Prison, ex parte Doyle* 2 K. B. 254, 272 (1917); *Collier* v. *Hicks*, [1831] 2 B & Ad. 663, 668; *Hearts of Oak Assurance Co. Ltd.* v. *A. G.* [1931] 2 Ch. 370, 385, 397.

[56] *McPherson* v. *McPherson*, [1936] A. C. 177; *R* v. *Neff*, [1947] 1 W. W. R. 640, 645, 88 Can. C. C. 199.

[57] *R* v. *Hamilton*, [1929] 30 S. R. N. S. W. 277, 47 N. S. W. W. N. 84.

[58] *R* v. *Ladbrooke*, [1931] N. L. R. 475.

[59] Michigan and Utah (*People* v. *Yeager*, *supra*, *People* v. *Bonza*, *supra*.)

[60] Seven states have statutes permitting exclusion of the public generally during all phases of some criminal trials: Code of Ala. 1940 Title 15 § 320, Ala. Const. of 1901 § 169; Georgia Code of 1933 § 81-1006; Mass. G. L. (Ter. Ed.) c. 278, § 16A (but only where prosecutrix is under 18); Miss. Const. Art. 3, § 26; 29 McKinney's Cons. Laws of N. Y. § 4; N. Dak. Rev. Code of 1943 27-0102; Code of Va. 1950, § 19-219; five states which have no statutes sanctioning blanket exclusion have endorsed it by judicial decision; *Keddington* v. *State*, 19 Ariz. 457, 172 P. 273 (1918); *Benedict* v. *People*, 23 Colo. 126, 46 P. 637 (1896); *Robertson* v. *State*, 64 Fla. 437, 60 So. 118 (1912); *State* v. *Johnson*, 26 Idaho 609, 144 P. 784 (1941); *Dutton* v. *State*, 123 Md. 373, 91 Atl. 417 (1914).

Thus, courts in the English speaking world almost uniformly refrain from excluding the public from the trials of criminal cases in any manner not related to the fair and orderly administration of justice. Indeed, petitioner proposed that the exclusion in this case be limited to the time of prosecutrix's testimony, an exclusion which might be justified as reasonably necessary, but the courts below ordered and upheld blanket exclusion of the general public in a manner that had no reasonable relation to this end.

Exclusion like that practiced in petitioner's trial has been upheld in Alabama as necessary to "restrict, in the interest of public morality attendance at trials of a salacious nature" *Weaver* v. *State*, 33 Ala. App. 207, 210, 31 So. 2d 593 (1947). Respondents seek to justify the exclusion in this case on these grounds,[61] although they suggest that an additional reason may have been to spare prosecutrix embarrassment. But even if one accepts the ques-

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[60] (Continued)

It should be noted that in these twelve states which appear to have permitted blanket exclusion of the public, at least five have upheld such exclusion only in cases where it was particularly noted that defendants did not object to the exclusion. *Dutton* v. *State, supra*; *Keddington* v. *State, supra*, at p. 462; *Benedict* v. *People, supra*, at p. 129; *State* v. *Nyhus*, 19 N. D. 326, 329, 124 N. W. 71 (1909); *Hampton* v. *Commonwealth*, 190 Va. 531, 58 S. E. 2d 288 (1950); (in this case it does not appear that objection was made, or that the exclusion order was assigned as error on appeal); in another of the twelve the challenged exclusion was in fact temporary, during the testimony of a frightened prosecutrix, *Moore* v. *State*, 151 Ga. 648, 651, 108 S. E. 47 (1921).

Two states have affirmed judgment following trials in which there were exclusion orders, but have noted in these cases, that there was no appreciable exclusion in fact. *State* v. *Croak*, 167 La. 92, 95, 118 So. 703 (1928) (those who asked to be admitted were admitted); *State* v. *Holm*, 67 Wyo. 360, 394, 224 P. 2d 500 (1950) (fair sized portion public present).

[61] Brief of Respondents in Opposition to Petition for Writ of Certiorari, p. 10.

tionable proposition [62] that courts may act as censors of public morals during the conduct of criminal cases, there was no need to exclude the public during all of the proceedings below. Most assurredly, for whatever end, there was no justification for excluding the public prior to the taking of testimony and during the empanelling of the jury.

In fact, the record shows that depriving petitioner of this valuable safeguard prior to the empanelling of the jury [63] may have well contributed to the empanelling of juror Page, the Chief of Police of the Montgomery Reserv Police Force (R. 172-173).[64] If the public had been present during this time it may be doubted whether Page would have failed to disclose his connection with the police force when questioned on the *voir dire*. At any rate, some member of the public might well have informed petitioner that Page was Chief of the Reserve Police and had been working on this case or—as even the State concedes—on cases of "alleged Negro rapists". One classic justification for the public trial guarantee is that it affords defendants the opportunity to receive relevant information from members of the public present at the trial, *Tanksley* v. *United States*, 145 F. 2d 58, 59 (C. A. 9th, 1944).[65]

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[62] See, Note 35 Cornell L. Q., 395, 399 (1949).

[63] Of course, the right to have the public present during the selection of the jury is subsumed under the right to a public trial. *United States v. Sorrentino*, 175 F. 2d 721 (C. A. 3d, 1949); See *State* v. *Brooks*, 92 Mo. 542, 573, 5 S. W. 257 (1887).

[64] Page was under no duty to serve. As a police officer on active duty, he could have requested and have been granted an excuse. *Pierson* v. *State*, 99 Ala. 148, 150, 13 So. 550 (1891).

[65] Other reasons for the presence of the public is that "[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power"; and that (fn. 24) "[t]he spectators learn about their government and acquire confidence in their judicial remedies" *Re Oliver, supra*, at p. 270.

Armed with accurate information concerning Page, it appears that petitioner could have successfuly challenged him for cause. *Shapiro* v. *City of Birmingham*, 30 Ala. App. 563, 565, 10 So. 2d 38 (1942). Certainly, having the information he would have and could have at least challenged Page peremptorily (R. 172) *Leach* v. *State*, 245 Ala. 539, 540, 18 So. 2d 289 (1944). Instead, unchallenged, Page sat in judgment on the same defendant whom, there was an offer to prove, he had helped tracked down and arrest (R. 172-173). He sat in judgment on the testimony and conduct of a half dozen or more of his fellow police officers, officials and detectives (R. 89, 96, 97, 99, 155, 157, 158). His commitment to the prosecution was that of the Mayor/judge in *Tumey* v. *Ohio*, 273 U. S. 510, who was barred by the Fourteenth Amendment from judging defendants for whose prosecution as a member of the Executive he was ultimately responsible. As Mr. Chief Justice Taft held in that case:

> "A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, involves a lack of due process of law in the trial of defendants charged with crimes before him." *Tumey* v. *Ohio*, 273 U. S. 510, 534.

The State Supreme Court (R. 193) and the trial court (R. 173) held that the motion for a mistrial on the ground that Page was Chief of Police was properly denied because it came too late. However, lack of diligence does not appear to have been the cause of the delay: Petitioner made the motion as soon as he obtained the information (R. 172). Petitioner asked a question as to occupation on the *voir dire* (R. 172), and Page did not disclose his police affiliation (R. 172). Moreover, the Solicitor knew that Page was on active duty with the police (R. 172) and as a quasi-judicial

officer was bound to disclose it.[66] But, the Solicitor who believed that Page's connection with the police reserve was no more relevant than his own with the naval reserve, said nothing. Thus Page was empanelled as a member of the jury while the public was excluded from the courtroom. It was not until almost the end of the trial that petitioner learned the true facts at which time he brought them to the attention of the court and unsuccessfully moved for a mistrial (R. 172). Petitioner, therefore, was tried by a juror who had an interest in his conviction which was concealed by the juror and by the State and of which petitioner, in the absence of the public, remained ignorant until such time as he was effectively blocked from making objection.

The fact that the public was arbitrarily barred from all phases of petitioner's trial requires reversal of the judgment below. The presence of the Chief of the Reserve Police Force on the jury emphasizes that the denial of this constitutional right may always be a grave matter. For this reason too, petitioner submits the judgment below must fall.

Conclusion

Petitioner has set forth in his argument a number of reasons why the judgment below should be reversed by this Court: The introduction into evidence of coerced confessions, denial of an opportunity to present to the jury the method by which these confessions were exacted, erroneous reliance upon *Stein* v. *New York*; systematic exclusion of Negroes from the jury; exclusion of the public from all phases of the trial.

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[66] Cf. *Mooney* v. *Holohan*, 294 U. S. 103, 114-115; *Berger* v. *United States*, 295 U. S. 78, 88; *Jones* v. *State*, 23 Ala. App. 493, 127 So. 681, 682.

As in all cases where a number of errors occur these could not but have a cumulative effect. However, the nature of these errors was such that in combination they acted powerfully to rob the proceedings below of the essential open quality which characterizes criminal proceedings in the United States, and indeed throughout the English speaking world. Thus, the conviction was based upon coerced statements obtained *in camera*; the method whereby the confessions were exacted was concealed from the jury; the jury itself which should have been drawn from a cross-section of the community was restricted in membership almost entirely to members of the dominant racial group in the community—indeed on it sat the Chief of the Reserve Police Force of Montgomery County; the general public was barred from all phases of the trial. The proceedings were closed, not open, in at least five vital respects.

Therefore, because of the denial of each of the constitutional rights complained of in this brief and because of their cumulative effect petitioner submits that the judgment below should be reversed.

Respectfully submitted,

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